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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

MOHAMMED AMOUCHAL, Plaintiff and Respondent, v. ALEXIS IGOR KUTYBA, Defendant and Appellant.	B284389 (Los Angeles County Super. Ct. No. BQ058218)

APPEAL from an order of the Superior Court of Los Angeles County, James E. Blancarte, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Reversed.

Alexis Kutyba, in pro. per., for Defendant and Appellant.

Law Office of Patrick Thomas Santos and Patrick Thomas Santos for Plaintiff and Respondent.

Alexis Igor Kutyba appeals from an order granting a request for a domestic violence restraining order in favor of Mohammed Amouchal.[1] We reverse.

FACTUAL BACKGROUND

In May 2017, Amouchal filed a request for a restraining order against Alexis under the Domestic Violence Protection Act (DVPA). (Fam. Code, § 6220 et seq.)[2] The request was based on Amouchal's allegation that Alexis pushed him on one occasion and threatened him on two occasions.

On May 23, 2017, the court granted a temporary restraining order and set the matter for a hearing.

Alexis filed a response to the request for a restraining order in which he denied ever striking, assaulting, or threatening Amouchal.

The hearing was held before Commissioner James Blancarte on July 5, 2017. Amouchal testified about an incident that occurred on February 7, in which Amouchal went to Alexis's residence to collect things that belonged to him.[3] According to

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[1] Alexis Kutyba is the brother of Natalia Kutyba, who is referred to in this opinion. To avoid confusion, and intending no disrespect, we will refer to each of these individuals by their first names.

[2] Unless otherwise specified, statutory references are to the Family Code.

[3] Amouchal indicated at the hearing that the pushing and threats occurred in February 2017. In his request for a restraining order, however, he stated that the incident occurred in May 2017.

Amouchal, Alexis and two others met Amouchal outside where they pushed Amouchal and threatened him.

Alexis testified that he did not push or threaten Amouchal.

The court stated that it believed Amouchal, but denied the restraining order because "[i]t's just pushing each other, what happens on the playground . . . in grammar school." The court told Amouchal, however, that if Alexis "ever lays hands on you again, come back, refile your case. I will remember this case and I will issue aggressive restraining orders, but I'm not going to do it today based on two grown men pushing each other."

In another case heard the same day, the court granted Amouchal's request for a restraining order against Alexis's sister, Natalia.

After the hearing, Commissioner Blancarte heard Natalia yelling outside the courtroom. The court then called Natalia, Amouchal, and Alexis back into the courtroom. The court asked Amouchal if Alexis had "anything to do with this," and Amouchal responded, "Yeah. They all threatened me." When the court asked what Alexis said to him, Amouchal responded, "See, also, go, 'what you get now. You so smart. You're the big Mohammed.' " Amouchal further stated that Natalia insulted his ethnicity. The court did not ask Alexis about the incident, allow Alexis to ask any questions, or permit argument.

Commissioner Blancarte informed the parties that he was striking his prior order and granting the restraining order against Alexis. He told Alexis and Natalia, "I tried to cut you both a break, but now I am issuing more aggressive orders"; "what you did outside my courtroom is unacceptable." In stating the terms of the order, the court told Alexis, "You're not to molest him like you did outside my courtroom" and "[y]ou are not to

disturb his peace like you did outside my courtroom." As the court continued to recite the terms, it appears from the transcript of the hearing that someone attempted to speak, but was rebuffed: "You don't have—no. Stop it. I am not interested [in] hearing from you anymore." The court then continued stating, "You are ordered to not contact [Amouchal] either directly or indirectly in any way" and must "stay at least 100 yards away from [Amouchal] at all times." The restraining order was set to expire in three years on July 5, 2020.[4]

The hearing concluded when Amouchal attempted to ask a question of the court, to which the court said: "I am done for today."

DISCUSSION

Alexis, representing himself, claims that the court permitted Amouchal to speak at the second hearing, but denied him an opportunity to speak or a "chance to explain [himself]." We agree, and conclude that the denial of that opportunity deprived Alexis of his statutory right to testify at the hearing and of his constitutional right to due process.

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[4] During the court's oral pronouncement of the restraining order, the court stated that Alexis must "stay at least 100 yards away from [Amouchal] at all times and all places, which means when he leave[s the court] today, that is the closest that he will ever be to [Amouchal] again in his life." The DVPA, however, does not permit restraining orders for life; the maximum is five years. (§ 6345, subd. (a).) The court's written order specified that it would expire in three years.

I.

A court may grant a restraining order under the DVPA if the evidence establishes, "to the satisfaction of the court, reasonable proof of a past act or acts of abuse." (§ 6300.)[5] Except for temporary restraining orders, which may be granted ex parte (§§ 241, 6300), the issuance of a restraining order under the DVPA requires notice and a hearing. (§§ 240, subd. (c), 241, 242, subd. (a).) That hearing is the only opportunity the defendant in a DVPA proceeding will have to present his or her defense. (Cf. *Schraer v. Berkeley Property Owners' Assn.* (1989) 207 Cal.App.3d 719, 733 (*Schraer*).)

DVPA hearings are subject to section 217, which provides that "the court shall receive any live, competent testimony that is relevant and within the scope of the hearing," unless the parties stipulate otherwise or the court makes an

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[5] "Abuse" under the DVPA includes: (1) intentionally or recklessly causing or attempting to cause bodily injury; (2) sexual assault; (3) placing "a person in reasonable apprehension of imminent serious bodily injury to that person or to another"; and (4) engaging "in any behavior that . . . could be enjoined pursuant to Section 6320." (§ 6203, subd. (a)(4).) Behavior that could be enjoined pursuant to section 6320 includes "molesting, attacking, striking, stalking, threatening, sexually assaulting, battering . . . harassing, telephoning, . . . contacting, either directly or indirectly, by mail or otherwise, coming within a specified distance of, or disturbing the peace of the other party." (§ 6320, subd. (a).) "[D]isturbing the peace" means "conduct that destroys the mental or emotional calm of the other party." (*In re Marriage of Nadkarni* (2009) 173 Cal.App.4th 1483, 1497.)

express "finding of good cause to refuse to receive live testimony." (§ 217, subds. (a) & (b).) The Legislature enacted this statute "to alleviate the harsh effects stemming from the common practice of family law courts seeking to expedite family law proceedings by requiring litigants to rely primarily on written declarations in lieu of introducing live testimony." (*In re Marriage of Binette* (2018) 24 Cal.App.5th 1119, 1126.)

Here, the parties did not stipulate to forgo oral testimony and the court made no finding of good cause for refusing to receive live testimony. The court was thus required to receive any live, competent testimony that was relevant and within the scope of the hearing. (§ 217; cf. *Nora v. Kaddo* (2004) 116 Cal.App.4th 1026, 1028–1029 [based on analogous language in Code of Civil Procedure section 527.6, court erred by denying parties the opportunity to present live testimony].)

It appears that the court granted the restraining order based on its determination that Alexis had "molest[ed]" Amouchal outside the courtroom and "disturb[ed] his peace." What happened during the incident outside the courtroom was therefore relevant and within the scope of the hearing, and Alexis, who was involved in the incident, was competent to testify about the matter.

The court, however, heard only from Amouchal as to what transpired outside the courtroom. According to Amouchal, Alexis told him, "See . . . 'what you get now. You so smart. You're the big Mohammed.' " The court did not ask Alexis about the incident or allow him to make a statement. Although the record indicates that, while the court was reciting the terms of the restraining order, someone desired to speak, the court refused to allow it. Viewed in its context—the court was speaking directly

to Alexis about the restraining order against him—it is likely that it was Alexis who was rebuked. After pronouncing the terms of the restraining order and dismissing a question from Amouchal, the court announced that it was "done for today," thus, foreclosing any further opportunity for anyone, including Alexis, to speak.

Because the court did not permit Alexis to testify regarding the incident outside the courtroom, the hearing did not comply with section 217.

II.

The constitutional requirement of due process requires the government to provide reasonable notice and an opportunity to be heard before depriving one of life, liberty, or property. (U.S. Const., 14th Amend., § 1; Cal. Const., art. I, §§ 7, subd. (a), 15; *Kentucky Dept. of Corrections v. Thompson* (1989) 490 U.S. 454, 460; *Today's Fresh Start, Inc. v. Los Angeles County Office of Education* (2013) 57 Cal.4th 197, 212.) This requirement applies to restraining orders, including those issued under the DVPA. (See *In re Marriage of Nadkarni*, *supra*, 173 Cal.App.4th at p. 1500; *Isidora M. v. Silvino M.* (2015) 239 Cal.App.4th 11, 22; cf. *Schraer*, *supra*, 207 Cal.App.3d at p. 732 [due process may require oral testimony before issuing civil harassment restraining order]; *In re Jonathan V.* (2018) 19 Cal.App.5th 236, 242 [due process must be satisfied before granting restraining order under Welfare and Institutions Code section 213.5].)

" 'The primary purpose of procedural due process is to provide affected parties with the right to be heard at a meaningful time and in a meaningful manner.' " (*Edward W. v. Lamkins* (2002) 99 Cal.App.4th 516, 532.) A meaningful manner ordinarily includes the "opportunity to be heard and

to adduce testimony from witnesses." (*In re James Q.* (2000) 81 Cal.App.4th 255, 263.) As our Supreme Court has stated in a family law case, a "party's opportunity to call witnesses to testify and to proffer admissible evidence is central to having his or her day in court." (*Elkins v. Superior Court* (2007) 41 Cal.4th 1337, 1357; see *Ross v. Figueroa* (2006) 139 Cal.App.4th 856, 866 [party opposing domestic violence restraining order has due process right to testify and raise questions to be posed to the moving party].)

The court's failure or refusal to allow Alexis to speak regarding the incident outside the courtroom deprived him of any opportunity to be heard on that dispositive factual issue. The court heard Amouchal's version of the events without permitting Alexis to offer evidence, cross-examine Amouchal, or argue the issue. Under these circumstances, Alexis was denied a meaningful opportunity to be heard and, therefore, deprived of his right to due process.

Amouchal concedes that the court "did not permit [Alexis] to speak," but offers as justifications that "there was nothing left to be said" and "no testimony would have persuaded the court to take any alternative path." The assertion that Alexis had nothing to say, however, is speculation belied by his apparent attempt to speak while the court was reciting the terms of the restraining order. Amouchal's assertion that the court would not have been persuaded by any further testimony is not only speculative, but assumes that Commissioner Blancarte had made up his mind upon hearing from Amouchal and appeared to decide the case without hearing from Alexis. Although the assumption is borne out by the record, it merely points to the unfairness of the hearing: Judges should not, of course, " ' "prejudge the

issues but should keep an open mind until all the evidence is presented to him [or her]." ' " (*In re Marriage of Carlsson* (2008) 163 Cal.App.4th 281, 291; see also *People v. Pena* (2004) 32 Cal.4th 389, 402 [courts are " 'obliged to display every indicia of having an open mind, subject to being persuaded by a logical and convincing argument, prior to announcing' its final decision"].) Amouchal's point thus reinforces our view that Alexis was deprived of due process and that the restraining order must be reversed.

III.

Because we cannot know what Alexis might have said if he had been allowed to testify or what the impact his statements or his cross-examination of Amouchal might have had on the court, the errors are not amenable to harmless error analysis and, therefore, reversible per se. (See *In re Marriage of Carlsson*, *supra*, 163 Cal.App.4th at p. 291 [" 'Denying a party the right to testify or to offer evidence is reversible per se.' "]; *Fremont Indemnity Co. v. Workers' Comp. Appeals Bd.* (1984) 153 Cal.App.3d 965, 971 ["The right of cross-examination of witnesses is fundamental, and its denial or undue restriction is reversible error."].)

DISPOSITION

The domestic violence restraining order against Alexis is reversed. The trial court is directed to file, on Judicial Council form DV-400 (findings and order to terminate restraining order after hearing), an order terminating the restraining order and to transmit the order to appropriate law enforcement personnel for entry into the Domestic Violence Restraining Order System (Fam. Code, § 6380, subd. (f)), via the California Law Enforcement Telecommunications System.

The parties shall bear their own costs on appeal.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur.

JOHNSON, J.

BENDIX, J.